Supreme Court, U.S.
FILED
APR 16 1999
CLERK

No. 98-1389

# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1998

DAVID M. DUREE,

Petitioner,

vs.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

*On Petition for a Writ of Certiorari to the Supreme Court of Kansas*

## REPLY BRIEF

DAVID M. DUREE
**Counsel of Record*
DAVID M. DUREE &
ASSOCIATES, P.C.
811-A North Second Street
St. Louis, MO 63102
(314) 621-5751
*Attorney for Petitioner*

## QUESTIONS PRESENTED

I. Whether an attorney's 14th Amendment due process rights to a fair and impartial trial before a fair and impartial judge were violated when the trial judge (who sanctioned the attorney in the sum of $408,445.25 and removed his authority to appear *pro hac vice*) admitted that she was unable to be fair and impartial as a result of a pre-decision *ex parte* conversation with another attorney from which she erroneously concluded that the attorney's client had a cocaine problem, the attorney knew about it and arranged for the preparation of an allegedly false income tax return to cover it up, where the trial judge also admitted that she was unable to separate this extrajudicial information and her erroneous conclusions from the merits of the claims against the attorney.

II. Whether an attorney's 14th Amendment due process rights to the probability and appearance of a fair trial before a fair tribunal were violated when the courts below concluded that the *ex parte* conversation by the trial judge (who sanctioned the attorney in the sum of $408,445.25 and removed his authority to appear *pro hac vice*) and the timing of her orders were "absolutely terrible in terms of eroding confidence in the independent exercise of judgment on the part of Judge Russell" and that the conduct of Judge Russell was "clearly inappropriate."

## TABLE OF CONTENTS

Page

Questions Presented ..... i

Table of Contents ..... ii

Table of Citations ..... iv

Reply Brief ..... 1

Reply Argument ..... 1

I. The undisputed facts establish that Judge Russell was admittedly unable to be fair and impartial with respect to Mr. Duree thereby establishing, clearly (a) that Mr. Duree was denied a fair hearing before a fair and impartial judge – (b) the existence of the probability of unfairness – (c) and the appearance of unfairness, in violation of Mr. Duree's due process rights. ..... 1

Conclusion ..... 10

Supplemental Appendix ..... 107a

Portions of Mr. Duree's October 25, 1995 deposition read into evidence during the March 8, 1996 hearing ..... 107a

Portions of oral argument by Mr. Duree opposing DAI's summary judgment motion on April 13, 1995 ..... 108a

Portions of Kessler and Banks' April 24, 1995 post-oral argument supplemental brief in opposition to DAI's motion for summary judgment – prepared and signed by Mr. Duree ..... 110a

Portions of the testimony of Mr. Duree during the hearing of April 16, 1996 ..... 111a

Portions of the July 2, 1997 deposition of John Gerstle, containing DAI's threat to sanction Mr. Duree's attorneys ..... 115a

The October 23, 1996 affidavit of Robert L. Carter describing the threats of DAI's attorneys to sanction him ..... 117a

# TABLE OF CITATIONS

## CASES CITED

Page

Baumgartner v. United States, 322 U.S. 665 (1944) ..... 8

In Re: Gwen G. Caranchini, 956 S.W.2d 910 (Mo. 1997) ..... 2

In Re: Murchison, 349 U.S. 133 (1955) ..... 9

Kirkland v. National Mortgage Network, 884 F.2d 1367 (11th Cir. 1989) ..... 2

Kohler v. Richardson-Merrell, 737 F.2d 1038 (D.C. Cir. 1984) ..... 2

Offutt v. United States, 348 U.S. 11 (1954) ..... 8, 9

Withrow v. Larkin, 421 U.S. 35 (1975) ..... 9

## REPLY BRIEF

## ARGUMENT

I. THE UNDISPUTED FACTS ESTABLISH THAT JUDGE RUSSELL WAS ADMITTEDLY UNABLE TO BE FAIR AND IMPARTIAL WITH RESPECT TO MR. DUREE THEREBY ESTABLISHING, CLEARLY (a) THAT MR. DUREE WAS DENIED A FAIR HEARING BEFORE A FAIR AND IMPARTIAL JUDGE – (b) THE EXISTENCE OF THE PROBABILITY OF UNFAIRNESS – (c) AND THE APPEARANCE OF UNFAIRNESS, IN VIOLATION OF MR. DUREE'S DUE PROCESS RIGHTS.

Contrary to DAI's assertions (DAI's Brief, p. 9), Mr. Duree does not ask this Court to re-determine the facts set forth in Judge Russell's May 31, 1996 memorandum opinion and the July 19, 1996 journal entry (drafted by DAI). Mr. Duree does contend that these findings are incorrect, resulting from the inability of Judge Russell to be fair and impartial – the probability of unfairness – and the appearance of unfairness, requiring a new hearing before a fair and impartial judge.

While Judge Sheppard concluded that it was not his responsibility to review these findings, at the trial court level, and the Kansas Supreme Court reviewed them on a deferential abuse of discretion standard, it is the facts surrounding Judge Russell's ability to be fair and impartial at the time she made these rulings that are the focus of this petition.

Mr. Duree's reference to the underlying facts was simply for the purpose of establishing that he has numerous good faith defenses to the claims asserted against him. See the petition at p. 26.

The Kansas rulings affected Mr. Duree's property interests (the sanction award was for $408,445.25) and his liberty interests. Kirkland v. National Mortgage Network, 884 F.2d 1367, 1371 (11th Cir. 1989) held that a property interest attached to an out-of-state attorney once he was admitted *pro hac vice*. See also Kohler v. Richardson-Merrell, 737 F.2d 1038, 1054 (D.C. Cir. 1984). Moreover, it is possible that some of the Kansas rulings may be afforded collateral estoppel status with respect to any proceedings concerning Mr. Duree's license in Missouri. In Re: Gwen G. Caranchini, 956 S.W.2d 910 (Mo. 1997).

DAI is an aggressive litigator which uses motions for sanctions and overstates the "facts" to demonize its litigation opponents and their attorneys, as standard litigation tactics. For example, DAI claims that Mr. Duree "finally admitted" to making the decision to have his accounting expert manufacture a fraudulent amended tax return. DAI's Brief, p. 2. It is telling that DAI relies upon the "findings" of Judge Russell for that erroneous conclusion and even misstates those findings. The source of that statement is simply Mr. Duree's testimony that he made the decision to prepare and file an amended return to correctly reflect the financial condition of Kessler and Banks.

Supplemental Appendix (S.A.), p. 107a. Moreover, Mr. Duree acknowledged making the decision when first asked in his October 25, 1995 deposition. He did not "finally," grudgingly, acknowledge it after first denying it, as suggested by DAI.

DAI also argues, as a "fact," that Mr. Duree tried his best to mislead the Kansas trial court with this false evidence. DAI's Brief, p. 2. In fact, Mr. Duree did not file a copy of the amended tax return with the trial court, or prepare, sign or file any pleadings relying upon the amended tax return or make any statement during oral argument in reliance upon the amended tax return, in opposing DAI's motion for summary judgment. When questioned by the court about the amended tax return, Mr. Duree responded, accurately, that it was an evidentiary detail which was not outcome determinative on the summary judgment motion, and that he did not know, without double-checking, whether it had been signed and filed with the Internal Revenue Service. S.A., pp. 108a-109a. This is all Mr. Duree ever said about the amended tax return in opposing the summary judgment motion, either orally or in writing. See also S.A., p. 110a.

DAI filed one motion for sanctions against Mr. Duree's attorneys, which was denied, and threatened them with another motion for sanctions unless they withdrew Mr. Duree's position based upon Judge Russell's admitted inability to be fair and impartial. S.A., pp. 115a-116a. Judge Sheppard stated that Mr. Duree's position was not frivolous, thereby discouraging DAI from filing the threatened motion for sanctions. 74a.

DAI also threatened Mr. Carter with sanctions unless he dismissed a lawsuit filed by David Otis against DAI, advising him that it would use Geoffrey Hazard to do to him what had been done to Mr. Duree in Kansas, and that he would be out shoveling snow with Mr. Duree for a living, unless he dismissed the David Otis complaint. S.A., pp. 117a-119a. That case was later settled (the amount is confidential) with payment by DAI to Mr. Otis.

Mr. Duree did not prepare, sign or file the opposition to DAI's 267 paragraphs of alleged uncontested facts or the pre-oral argument brief in opposition to DAI's motion for summary judgment. DAI has suggested that Mr. Duree read those pleadings before they were filed. DAI's Appendix A, p. 3. DAI includes a question, beginning at page 130 of the April 16, 1996 hearing, without an answer, then portions of another question, beginning on page 133, followed by the answer to that question "I was," while omitting all of pages 131 and 132 which include Mr. Duree's testimony that he first reviewed the pre-summary judgment motion pleadings after they were filed. DAI also excludes Mr. Duree's other testimony, the same day, that he had reviewed those pleadings only in preparation for the oral argument and that the summary judgment responses were prepared by Bob Carter and Don Weber. Compare DAI's Appendix, p. 3 with S.A., pp. 111a-114a.

DAI also suggests that Mr. Duree wrote the pre-oral argument brief opposing summary judgment. DAI's Appendix, p. 4. However, the brief under discussion there was the post-oral argument brief,

which did not rely upon the amended tax return and which attached an affidavit from Su Linda Jamison (in response to Judge Russell's questions during the oral argument on April 13, 1995) stating that the 1989 amended tax return had been filed with the IRS during January, 1993. In referring to the amended tax return in that post-oral argument brief, Mr. Duree stated "the issues of whether the defendants signed and filed amended tax returns and whether copies of those amended tax returns were provided to DAI are not controlling in this case." S.A., p. 110a.

It is particularly important in a case involving an aggressive litigator like DAI for the party defending such charges to have a fair trial before a fair and impartial judge – which prevents even the probability of unfairness – as well as the appearance of a fair trial.

Judge Russell testified that she was about to complete her memorandum opinion at the time of the *ex parte* conversation with John Gerstle. 58a. Yet the memorandum opinion of May 31, 1996 suggests that Judge Russell already believed that Nancy Kessler was using cash register receipts to pay for drugs since she found, 40a, "the rest was taken out of the till to pay food vendors, or for whatever else Kessler and Banks were using it for." While that comment could have been influenced by the *ex parte* conversation, it also could have been influenced by Judge Russell's admitted "suspicion," going back to the summary judgment ruling on June 9, 1995, that Nancy Kessler "might be taking money out the till to support a drug habit, ***" 57a. Judge Russell's suspicions and

conclusions about Nancy Kessler caused her, inexplicably, to conclude simultaneously that Mr. Duree was involved in Nancy Kessler's alleged drug use and that he attempted to cover it up through the use of the amended tax return. These conclusions (and suspicions) were prejudicial to Mr. Duree.

Although there is no logical basis to support it, Judge Russell's extrajudicial information about Nancy Kessler's alleged drug habit caused her to immediately assume that Mr. Duree had knowledge of Nancy Kessler's alleged drug use and arranged for preparation of the amended tax return as a result. 60a-65a.

Judge Russell acknowledged that she immediately concluded, at the time of the *ex parte* conversation (erroneously), that Nancy Kessler was a client of Mr. Gerstle's on some drug charge, that Mr. Duree knew about Nancy Kessler's drug problem (that was erroneous), that Mr. Duree knew that Nancy Kessler was taking money out of the till of the Subway shop (during 1989-90) to support her drug habit (that was erroneous) and that the amended tax return was prepared (during 1992 and filed in January, 1993) as a result of Mr. Duree's knowledge of the drug problem (that was erroneous), to make it more difficult to discern the drug problem (that was erroneous, as well as illogical) and that Mr. Duree hired Mr. Gerstle (that was erroneous) to get rid of the cocaine problem with Nancy Kessler (that was erroneous). 60a-65a.

Judge Russell acknowledged that all of these conclusions which she reached back at the time of the discussion with Mr. Gerstle, caused her to feel that she could not be an impartial hearer of the facts. She acknowledged that she could not get the conversation with John Gerstle out of her mind, and that she found it impossible to separate the conversation from the issues she was called upon to decide on November 8, 1996 (the post-judgment motions). 60a-65a.

Judge Russell then acknowledged that the circumstances which caused her to recuse herself on November 8, 1996 existed when her memorandum opinion was filed on May 31, 1996 and when the journal entry (formal judgment) was filed on July 19, 1996. 65a.

Judge Russell's diametrically opposed conclusions about the amended 1989 tax return further establish her inability to be fair and impartial toward Mr. Duree at the time of her May 31, 1996 memorandum opinion and July 19, 1996 journal entry. On June 9, 1995, Judge Russell concluded that the original and amended 1989 tax returns were immaterial to the summary judgment motion on the counterclaim for fraud, thereby permitting her to grant summary judgment in favor of DAI and against Kessler and Banks. 5a. Less than one year later, Judge Russell concluded that "but for" the amended 1989 tax return, Kessler and Banks could not have filed their counterclaim for fraud, 43a, thereby permitting Judge Russell to award sanctions against Mr. Duree in the sum of $408,445.25 because "but for the false return, their fraud claim could not have been filed." These two conclusions about the amended tax

return and its relationship to the fraud counterclaim, coming less than one year apart, cannot be reconciled. The only event of significance which occurred between the two dates (June 9, 1995 and May 31, 1996) is the *ex parte* conversation between Judge Russell and John Gerstle.

This Court is not bound by Judge Sheppard's conclusion that the average person, when provided with this information, would conclude that Judge Russell was fair and impartial with respect to Mr. Duree when she entered her memorandum opinion on May 31, 1996 and the journal entry on July 19, 1996, particularly in view of the findings by Judge Sheppard and the Kansas Supreme Court that the timing of the *ex parte* conversation and Judge Russell's rulings were "absolutely terrible in terms of eroding confidence in the independent exercise of judgment on the part of Judge Russell" and that the conduct of Judge Russell and John Gerstle with respect to the *ex parte* conversation was clearly inappropriate, along with John Gerstle's testimony that he believes the *ex parte* conversation occurred in 1995, not on May 24, 1996 as asserted by Judge Russell. 71a, 73a, 74a.

There is a distinction between giving great weight to the findings of fact of the lower courts on subordinate facts and the weight to be afforded the conclusions of the lower courts which may imply a standard of law on which the judgment rests. Offutt v. United States, 348 U.S. 11, 15 (1954); Baumgartner v. United States, 322 U.S. 665, 670-671 (1944).

Due process requires a fair hearing before a fair and impartial judge – precluding even the probability of unfairness – and precluding the appearance of unfairness. In Re: Murchison, 349 U.S. 133, 136 (1955); Withrow v. Larkin, 421 U.S. 35, 46, 47 (1975); Offutt v. United States, 348 U.S. 11, 14 (1954).

Judge Sheppard refused to review Judge Russell's rulings on the merits and the Supreme Court of Kansas reviewed them on a deferential abuse of discretion standard while simultaneously stating, incorrectly, that Judge Russell did not acknowledge that she was unable to be fair and impartial or that she was unable to separate her extrajudicial information from the evidence before her. 94a. The Kansas Supreme Court merely inaccurately described the unequivocal testimony of Judge Russell. That "conclusion" is not binding on this Court.

Under these circumstances, the due process requirements of the Fourteenth Amendment requiring a fair hearing before a fair and impartial judge – precluding even the probability of unfairness – and precluding the appearance of unfairness – were clearly not met by the proceedings in Kansas.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, Petitioner, David M. Duree, respectfully submits that the Petition should be granted.

David M. Duree
DAVID M. DUREE &
ASSOCIATES, P.C.
811-A North Second Street
St. Louis, MO 63102-2174
(314) 621-5751

Attorney for Petitioner

# SUPPLEMENTAL APPENDIX

PORTIONS OF MR. DUREE'S OCTOBER 25, 1995 DEPOSITION READ INTO EVIDENCE DURING THE MARCH 8, 1996 HEARING:

Q: And after you had these communications that you've just testified about with either Mr. Seiffert and/or Ms. Kessler or Mr. Banks, you directed Mr. Seiffert to prepare certain amended returns for 1989 and also to prepare certain returns for periods that Ms. Kessler, Mr. Banks or their partnership had not filed yet filed returns.

A (by Mr. Duree): Yes. In this way: The question was posed to me through either Bob Carter, Bob Seiffert, Nancy Kessler or Dane Banks or a combination of them as to whether or not we should prepare amended tax returns to more accurately reflect their financial condition or simply argue in our case that the tax return prepared by H & R Block was wrong, and at the same time whether or not we should see that they have tax returns on file for this 1990 or whatever the other year was. And at some point in time, I made the decision, yes, to have Mr. Seiffert prepare the amended tax returns and/or original tax returns and file them.

PORTIONS OF ORAL ARGUMENT BY MR. DUREE OPPOSING DAI'S SUMMARY JUDGMENT MOTION ON APRIL 13, 1995:

(BY MR. DUREE): For example, the reference to the amended tax return. I don't want to blow that out of proportion, Your Honor, but that is an evidentiary detail which is not controlling on any of the ultimate issues in the fact – in the case.

THE COURT: Let me ask you, though, as an officer of the Court, has that tax return been filed?

MR. DUREE: I cannot state to the Court right now whether that has or has not been filed with the IRS. I would have to double-check. I cannot say.

THE COURT: This is something that you consider very important, but you haven't asked your client if it has been filed? You considered it important enough that you alleged – basically, your brief attacks Mr. Dunham's ethical performance of his duty based upon his talking about the tax return, and you base that all on a tax return that you don't know whether it has been filed or not?

MR. DUREE: The issue of whether or not it has been filed, Your Honor, has no bearing on the outcome of this case. It doesn't control any of the ultimate issues of fact. It is a detail dealing with damages on which both experts disagree. (emphasis added).

THE COURT: I guess it disturbs me, though, that you are attacking another attorney's ethics based

upon a tax return that you can't tell me if it has been signed or filed. That disturbs me.

MR. DUREE: I cannot today. I did not prepare all of these documents, Your Honor. My point today is, it may have merit on the motion for sanctions, [the April 12, 1995 motion against DAI and its attorneys] Your Honor, but it has nothing to do with whether they are or are not entitled to a summary judgment.

And I want to bring the Court back to the focus on the summary judgment here, whether or not there are disputes of fact, whether or not as a matter of law Doctor's Associates is entitled to summary judgment. That is the issue before the Court.

The issue about the tax return, which if I heard Mr. Dunham correctly, he said that he didn't have it, and then he produced it. Again, that has nothing to do with the summary judgment here. It is an evidentiary detail on which the two experts disagree. (emphasis added)

PORTIONS OF KESSLER AND BANKS' APRIL 24, 1995 POST-ORAL ARGUMENT SUPPLEMENTAL BRIEF IN OPPOSITION TO DAI'S MOTION FOR SUMMARY JUDGMENT – PREPARED AND SIGNED BY MR. DUREE:

* * *

(at page 26)

VI.

DEFENDANTS SIGNED AND FILED THEIR AMENDED TAX RETURNS DURING JANUARY, 1993 AND DAI WAS PROVIDED WITH A COPY OF THOSE AMENDED RETURNS (EITHER SIGNED OR UNSIGNED) AT THAT TIME

The issues of whether the Defendants signed and filed amended tax returns and whether copies of those amended tax returns were provided to DAI are not controlling in this case. (emphasis added)

Nevertheless, since this has become a subissue, Defendants attach hereto a copy of Su Linda Jamison's Affidavit, dated April 18, 1995. The original affidavit was filed with the Court during the past week.

PORTIONS OF THE TESTIMONY OF MR. DUREE DURING THE HEARING OF APRIL 16, 1996

(at page 96):

(TESTIMONY BY MR. DUREE): * * * Although I didn't prepare the responses to the summary judgment, I came out to argue the oral argument on the summary judgment motion on April 13, 1995.

In preparing for that, I reviewed the documents in general, I reviewed the legal arguments in general, and prepared to make the oral argument, the gist of which was that we believed there were disputed issues of fact which would preclude the entry of summary judgment. * * *

(at page 130):

Q And when you, as lead counsel, discharging your responsibilities, reviewed these documents before they were filed with the Court, the affidavit from Robert Seiffert dated April 1, 1995, contained the representation under oath that appears on this enlargement that I've placed before you, from Paragraph 3(n) where Mr. Seiffert took Robert Karn to task because Mr. Karn didn't quote the, quote, "correct," closed quote, figures from the amended tax return; correct?

(continuing on page 131):

A Yes.

* * *

(continuing on page 132):

* * *

Q And in conjunction with that oral argument or in preparation for that oral argument you reviewed these materials again so that you could effectively discharge your obligation as lead counsel during oral argument. Right?

A No, you say "again." That is when I reviewed the documents, to come here for the oral argument on summary judgment.

* * *

(continuing at page 132):

Q Okay. And I think that Judge Russell heard my questions and heard your answers.

When you stood up to argue in opposition to summary judgment, you were the spokesperson for the position that you and your colleagues had

(continuing at page 133):

put forth in the paper opposing the summary judgment? Correct?

A I was.

* * *

(continuing at page 133):

Q And after that hearing - - I think that you testified about this; I just want to make sure that this is correct, that you have a clear recollection of being the person who wrote the brief that your firm filed opposing, the supplemental brief opposing summary judgment, that was filed after the April 13th hearing; correct?

A I wrote the brief, not the attached affidavits, but I wrote the brief. [referring to the April 18, 1995 affidavit of Su Linda Jamison stating that the 1989 tax returns had been filed with the IRS and the post-oral argument brief set forth at 110a]

Q Okay. But you reviewed the affidavits before they were filed with the Court, again, consistent with your obligations as chief executive of your side of the case; right?

(continuing at page 134):

A I'm not sure how I reviewed them. I wrote the brief, had it filed, had the affidavits attached, but I don't - - I'm not taking the position, if there is something in the affidavit, that I shouldn't know about it.

Q I just want to make sure that we all understand what your position is here, that the credibility of which, along with other things, Judge Russell is going to have to assess.

Bob Carter and Don Webber, who are conspicuously not here to defend themselves or to testify under oath - -

A I'm not sure they are being charged.

Q -- it's your – well, not yet, Mr. Duree, not until your testimony, anyway.

They are not here to testify, but basically what you want the Judge to believe is Bob Carter and Don Webber, between the two them, put together the papers opposing summary judgment. That is one of the things that you would hope that the Judge would conclude based upon your testimony?

A Well, it's true.

Q You also want the Judge to conclude that this is all a tempest in a teapot, just sort of made up,.

(continuing at page 135):

because this is what I like to do is travel around the country and do these things. And you want her to make a finding that none of this is material; right? That is what you started to say when I jumped up and objected just now and said, "That is not testimony, that is legal argument." That is one of your positions, "not material"?

A Well, what I want the Judge to conclude is that I did not make false statements to the Court, intentionally, at any time on any material issue, or any issue, period.

PORTIONS OF THE JULY 2, 1997 DEPOSITION OF JOHN GERSTLE, CONTAINING DAI'S THREAT TO SANCTION MR. DUREE'S ATTORNEYS

(at pages 87-91)

MR. DUNHAM: I want to place on the record now a summary of the conversation that I just had off the record with Mr. Lancaster which is further to the remarks I started to make after I completed my direct examination with Mr. Gerstle before Mr. Lancaster asked that I agreed to let him do his cross-examination before I formulated my client's position.

And I will also state that Mr. Lancaster, after I told him what I was going to say on the record, told me that he did not want to stay and listen to it. And I believe that Mr. Wilkins would confirm audibly on the record now that that is what he told us before he left.

MR. WILKINS: That is correct. And he left the room about one minute ago.

MR. DUNHAM: What I told Mr. Lancaster was as follows: Putting aside the question whether he previously before today had any good faith basis for his motion in supporting the memorandum challenging Judge Russell's decisions because of her conversation with John Gerstle, that based upon the sworn testimony of Judge Russell and the sworn testimony of Mr. Gerstle, Mr. Lancaster emphatically, without qualifications, no longer had any good faith basis for maintaining that motion and the supporting memorandum, including what I

characterized earlier as the scurrilous accusations of wrongdoing against Judge Janice Russell.

I told Mr. Lancaster that unless his motion and supporting memorandum were withdrawn and unless this was the last we heard about this issue of the conversation between Judge Russell and Mr. Gerstle now and on appeal, that I would be filing a motion for sanctions against him because of his bad faith misconduct in maintaining that motion and the position set forth in the motion. (emphasis added)

* * *

(continuing at page 91)

I repeat once again for the record that if I have to come back to Kansas for a hearing before Judge Sheppard on Tuesday, I will, as I have previously informed Mr. Lancaster, seek sanctions against him and Ms. Lang for their bad faith misconduct in maintaining a position that they can no longer maintain in good faith based upon the testimony we have gotten today. (emphasis added)

## THE OCTOBER 23, 1996 AFFIDAVIT OF ROBERT L. CARTER DESCRIBING THE THREATS OF DAI'S ATTORNEYS TO SANCTION HIM

Robert L. Carter, being duly sworn upon his oath, under penalty of perjury, deposes and states:

1. I am a shareholder in the law firm of Reinert & Duree, P.C.

2. Along with David Duree, I have represented numerous franchisees and other parties who have litigated disputes with Doctor's Associates, Inc.

3. I am one of the attorneys for Nancy Kessler and Dane Banks in this case.

4. I am also one of the attorneys representing David Otis in a lawsuit against Doctor's Associates, Inc. et al., pending in the United States District Court for the Northern District of Illinois (Chicago).

5. During the latter part of June and July, 1996, I attended five days of deposition of my client, David Otis. The deposition was conducted by Edward Wood Dunham on behalf of Doctor's Associates, Inc., et al.

6. On Thursday, June 27, 1996, following completion of the first day of the deposition of David

Otis, Edward Wood Dunham spoke to me privately in the hall outside the deposition.

7. In that conversation Mr. Dunham stated that because of the $408,000.00 Kansas sanction and accompanying referral of the matter to the Missouri and Illinois bar committees, David Duree would be out shoveling snow for a living in the near future. He stated further that if I proceeded to file a proposed Amended Complaint on behalf of David Otis in that case, which I had shown to Mr. Dunham during the deposition, he would go after my ticket (license to practice law) in the same manner as he obtained sanctions against David Duree in Kansas. Mr. Dunham also stated that if David Otis was to dismiss his case with prejudice he would provide a release from liability for David Duree, myself, David Otis, and our local counsel. Mr. Dunham stated, however, that if the defendants won the Otis case, either on a summary judgment motion or at trial, he would file a malicious prosecution action for damages against David Duree, myself, and David Otis, as well as our local counsel, Jacqueline Kidder and Jeffrey Berman of the firm of Ross & Hardies.

8. David Otis' depositions were resumed on Monday, July 15, 1996. Immediately prior to the time the deposition was commenced, Edward Wood Dunham spoke to me in the hall outside the conference room. Mr. Dunham emphasized that if I filed an Amended Complaint he would pursue sanctions against me. David M. Duree, and Reinert & Duree, P.C., as well as against our local counsel. He also stated that if I continued to prosecute the Otis lawsuit and if I filed an Amended Complaint, he

would go after my ticket to practice and assisting counsel's ticket in the same manner and with the same resources including expert Geoffrey Hazard that he used in going after David Duree in Kansas. He stated that if I did not carefully consider the consequences of my actions, I would be out shoveling snow for a living with Duree.

* * *

S / Robert L. Carter

Subscribed to and sworn before me, a Notary Public, this 23rd day of October, 1996.